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No. 82-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 AND EAST JEFFERSON HOSPITAL BOARD,
Petitioners,

v.

EDWIN G. HYDE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE NATIONAL ASSOCIATION OF PRIVATE PSYCHIATRIC HOSPITALS AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Amicus curiae, the National Association of Private Psychiatric Hospitals ("NAPPH"), is the nation's largest organization of hospitals devoted primarily to psychiatric treatment. Founded in 1933, NAPPH currently has 201 member-hospitals located in forty states. Membership in the Association is limited to facilities that have been accredited as psychiatric hospitals by the Joint

Commission on the Accreditation of Hospitals. Approximately one-third of NAPPH's members are hospitals organized as non-profit corporations. The rest are for-profit hospitals, including both independent, "proprietary" facilities and those that are members of multi-hospital organizations owned by publicly-traded corporations.

NAPPH and its member-hospitals are keenly interested in the issues presented in this case. The decision of the Fifth Circuit, while specifically addressing anesthesiology services, has created substantial uncertainty concerning the lawfulness of all "closed" hospital staffs—*i.e.*, staffing arrangements requiring the patient to be treated by a physician provided by the hospital. NAPPH estimates that at least one-third of its members have closed psychiatric staffs. This arrangement greatly facilitates those kinds of intensive psychiatric treatments that require comprehensive staff involvement with patients, typically over long periods of time. These full-time staff become part of the overall therapeutic milieu, thereby establishing continuity and security for very sick and withdrawn patients.

Other NAPPH member-hospitals, which generally offer acute care psychiatric treatment that can be administered in shorter time periods, allow a patient to select his own psychiatrist from among those who have admitting privileges. This arrangement effectively permits the psychiatrist and patient to maintain continuity of care between the hospital and outpatient settings. Collectively, these different approaches enable psychiatric hospitals to provide a wide spectrum of treatment modalities, which is necessary to meet the varying needs of different patients. If closed staff hospitals were to be found unlawful, an important part of this spectrum would be eliminated.

The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

STATEMENT

Petitioner, East Jefferson General Hospital, is a large public hospital located in the New Orleans metropolitan area in East Jefferson Parish. From 1971 on, all anesthesiology services at the hospital were provided by Roux & Associates, a professional medical corporation of anesthesiologists. These services were provided pursuant to an "exclusive" agreement: the doctors of the Roux group promised to devote all their services to the hospital, and the hospital, in turn, agreed not to engage the services of other anesthesiologists. (Pet. App. 20a-23a).

Petitioner's decision to contract with Roux was based on the hospital's judgment that its anesthesiology department could be run more efficiently through the full-time services of a small group of anesthesiologists than through the part-time services of a large and indeterminate number of anesthesiologists in an "open" department. (Pet. App. 22a, 32a). Under the contracts, Roux undertook responsibility for the administration of the anesthesiology department, the scheduling of all anesthesiology procedures and the supervision of a staff of registered nurse anesthetists employed by the hospital to perform many routine anesthesia procedures.

The financial terms of the contracts allocated to the Roux group a predetermined percentage of all billings of the hospital anesthesiology department. Roux initially received 48 percent of department revenues; its share was reduced to 46 percent in 1976. (Pet. App. 23a-24a, JA 20, 27). Although Roux was permitted to make recommendations to the hospital concerning the fees to be charged to patients for anesthesiology services, the ultimate responsibility for setting fees remained with the hospital.[1]

[1] The Court of Appeals appeared to believe that the fees were set by the Roux group. 686 F.2d at 287. However, the contracts themselves make clear that final authority for the setting of fees was vested in the hospital. See JA pp. 19, 26.

In 1977, respondent, a board certified anesthesiologist, applied for a position on the hospital's medical staff. Based on a review of his credentials, the medical staff recommended that the application be granted. However, the hospital's board of directors rejected that recommendation on the basis of the exclusive contractual arrangement with Roux. (Pet. App. 25a). Respondent then filed this lawsuit, claiming that the Roux contract constituted an unlawful "tie-in" under the Sherman Act, and seeking injunctive relief that would allow him to practice at East Jefferson Hospital.

Decisions Below

The district court rejected respondent's antitrust claim. Although it assumed that the hospital's agreement with Roux tied anesthesiology services to use of the hospital's operating rooms, it concluded that the arrangement produced substantial economic benefits and no discernible anticompetitive effects. In weighing the benefits fostered by the "closed system" anesthesiology department, the district court made the following findings of fact (Pet. App. 32a-33a):

> [The contractual arrangement with the Roux goup] ensures twenty-four hour anesthesiology coverage, aids in the control and standardization of procedures and the efficient and less costly operation of the department; it lends flexibility to the scheduling of operations because it is not necessary to accommodate physicians with outside commitments; it permits the physicians, nurses, and other technicians in the department to develop a work routine and a proficiency with the equipment they use in patient treatment; and it increases the Board's ability to monitor the medical standards exercised because there are fewer individuals involved, maintenance of equipment is simplified, and equipment breakdowns are minimized by limiting use to one group of physicians.

Regarding the competitive consequences of the Roux contract, the district court concluded that East Jefferson

Hospital was without "economic power in the market in which it competes . . ." and was therefore in no position "to charge patients higher prices or to impose burdensome terms which could not be exacted in a completely competitive market." (Pet. App. 34a). Noting that 70 percent of the patients in East Jefferson Parish use hospitals in other parts of the New Orleans area, the court held that, at a minimum, the relevant geographic market included at least twenty hospitals in addition to petitioner. (Pet. App. 38a; 686 F.2d at 290.)

The Court of Appeals reversed, holding that the hospital's closed system anesthesiology department constituted a tie-in that was illegal *per se* under the Sherman Act. The Court began by asserting that the arrangement between the hospital and Roux involved two economically discrete "products" for purposes of tie-in analysis—the hospital operating rooms (the tying product) and anesthesiology services (the tied product). Observing that "users of the hospital's operating rooms . . . are also compelled to purchase the hospital's chosen anesthesia service," the Court asserted that "[i]t is . . . clear that we are dealing with two distinct services which a buyer should be able to obtain separately." 686 F.2d at 289.

Having begun with the proposition that the Roux agreement constituted a tie-in, the Court next determined that East Jefferson Hospital possessed market power in the relevant market for the use of hospital operating rooms. The Fifth Circuit did not suggest that the hospital had been able to elevate prices above competitive levels; on the contrary, the Court expressly found that "the tying of anesthesia services to operating rooms . . . did not lead to a higher charge for anesthesia services." 686 F.2d at 291. Nonetheless, the Court determined that the relevant geographic market was far smaller than the district court had supposed. Finding that East Jefferson Hospital did not face competition from any of the other hospitals in the New Orleans metropolitan area, the Court

concluded, in effect, that petitioner constituted a relevant market unto itself.

In reaching its decision, the Fifth Circuit did not reject any of the district court's factual findings as clearly erroneous. Rather, the Court focused on generic factors that it characterized as "market imperfections in the health care industry." *Ibid.* The Court pointed to the widespread use of third-party insurance, which insulates patients from concern over the costs of health care. The Court also noted the lack of complete information among patients regarding the cost and quality of the health services that they buy. In addition, the Court asserted that "patients tend to choose hospitals by location rather than price or quality." *Ibid.*

Turning to the economic consequences of the closed department system, the Court first observed that the challenged arrangement restricted patients' freedom to choose an anesthesiologist. However, the court identified the reduction in the hospital's costs as the major anticompetitive effect of the Roux contract. By holding down the costs of anesthesiology services, the efficiencies created by the closed department system resulted in increased profits to the hospital—an economic harm, in the Court's view. 686 F.2d at 291-92. The Court, applying a *per se* standard, also gave short shrift to the various justifications that had been advanced for the hospital's arrangement with Roux, concluding that there existed "less restrictive" ways to achieve each of the asserted economic benefits. 686 F.2d at 292.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the lawfulness under the antitrust laws of the common hospital practice of "closing" specialized medical departments in order to achieve efficiencies in the delivery of certain health services. Such closed department arrangements are typically maintained in one of two ways. First, the hospital may enter into a

contractual agreement with a group of medical specialists, designating that group as the exclusive provider of a particular medical service. Second, the hospital may decide to integrate a particular department or service into its own operations by hiring a staff of doctors and related professionals to furnish all medical services of a particular type.

Until now all antitrust challenges to closed department arrangements have been turned aside by the federal courts. See *Smith v. Northern Michigan Hospitals, Inc.*, Nos. 81-1513 (6th Cir. March 25, 1983); *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982); *Capili v. Shott*, 620 F.2d 438 (4th Cir. 1980); *Harron v. United Medical Center Inc.*, 522 F.2d 1133 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976); *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 824 (3d Cir.), *cert. denied*, No. 82-415 (Nov. 1, 1982). Recognizing that such arrangements may actually facilitate competition rather than harm it, these courts have properly declined to invoke a rule of *per se* illegality.

Amicus submits that the decision below cannot be sustained. We first show that the Fifth Circuit's decision amounts to nothing less than wholesale condemnation under a tie-in theory of the fundamental principle of economically integrated production. Seen in this light, the Court's decision represents a radical and wholly unjustified extension of the rule of *per se* illegality in antitrust cases.

Having demonstrated that the Court of Appeals used the wrong standard of analysis, we next show that the Court erred in holding that petitioner's combined sale of operating room time (the alleged tying product) and anesthesiology services (the alleged tied product) constitute a tie-in. Amicus contends that the separability of the components of such a transaction should not cause it

to be condemned without a full consideration of its competitive consequences. Viewed in those terms, a closed staff arrangement plainly has many procompetitive effects and causes little, if any, restraint on competition.

Finally, we show that the Fifth Circuit used an incorrect analysis in holding that East Jefferson Hospital possesses economic power in the market for the alleged tying product. There is simply no merit to the suggestion that petitioner constitutes a relevant geographic market unto itself.

ARGUMENT

I. The Court of Appeals' Decision Represents a Radical and Wholly Unsupported Application of the Per Se Doctrine in Antitrust Analysis

The Court of Appeals' decision turns the antitrust laws on their head by condemning as *per se* illegal an economic arrangement whose obvious purpose—and demonstrated effect—is to enhance efficiencies in the delivery of a particular health service to consumers. The Fifth Circuit's decision thus represents a radical, and wholly unwarranted, extension of the Sherman Act's rule of *per se* illegality.

The classification of petitioner's contract with the Roux group as an unlawful tie-in rests on two key propositions. The first is that the "packaged" sale of a combination of medical services constitutes a tying arrangement whenever the components of the package are theoretically separable. Thus, anesthesiology services are tied to the use of hospital operating rooms, in the Court's view, because a patient undergoing surgery *could* engage the services of an anesthesiologist who is not part of the Roux group.[2]

[2] It should be noted that this analysis attaches no relevance to the existence of a contract between Roux and the hospital; the same tie-in classification would apply to any hospital-based good or service, whether furnished by independent contractors or full- or part-time employees.

The second proposition is that every hospital is a monopolist, or at least has sufficient market power to trigger *per se* analysis under the Sherman Act. This follows from the Court's definition of the relevant market on the basis of generic factors applicable throughout the health industry.

If this analysis is correct, it follows that every hospital in the country is a labyrinth of antitrust violations. At a minimum, of course, the Court's decision extends to all hospitals employing closed staff arrangements for various medical specialties. Such arrangements are, as the district court found, "common practice in the health care industry." (Pet. App. 32a). *See Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1351 (7th Cir. 1982). *See generally* D. Horan & N. Nord, *Application of Antitrust Law to the Health Care Delivery System*, 9 Cumberland L. Rev. 685 (1979). The Court's decision does not stop here, however. Equally suspect under the Fifth Circuit's analysis is the routine provision by hospitals of meals, linen service, nursing care, blood, pharmaceuticals, and myriad other goods and services furnished either by hospital employees or independent suppliers under contract with the hospital. Such economic "inputs" are provided to patients as part of a package of hospital-based health care services. If the Court below is correct, the failure to make available each of these goods or services on an *a la carte* basis constitutes a tie-in, unlawful *per se* on the basis of the hospital's presumed market domination.

Nor can the Court of Appeals' reasoning be meaningfully confined to the health care industry. There is no end to the list of theoretically separable products that are sold in combination as a single "good." Shirts with buttons, automobiles with tires, flashlights with bulbs, a hamburger with a bun, and right shoes sold together with left shoes are all examples of tying arrangements under the Fifth Circuit's reasoning, and all must be invalidated un-

der the Sherman Act, provided the requisite market power can be shown. Little familiarity with economic theory is necessary to see that these products are not usually sold together for the purpose of extending economic power from one product market to another—the principle economic harm to which the tie-in doctrine is addressed. See *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 617 (1977) ("Fortner II"). On the contrary, they are sold together in most, if not all, instances for the purpose of realizing efficiencies available through economically integrated production.

If nothing else, the implications of the Court of Appeals' reasoning establish that the contractual arrangement between petitioner and the Roux group should not be analyzed under a rule of *per se* illegality. Such rules "are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). They are to be narrowly confined to "naked restraints of trade [having] no purpose except stifling of competition," *White Motor Co. v. United States*, 372 U.S. 253, 263 (1953), and whose "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . ." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). As this Court recently stated, the inquiry must be whether the challenged practice "facially appears to be one that would always or almost always tend to restrict competition . . ." *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 19-20 (1979).

Judged against these standards, the Court of Appeals' decision must be set aside. At a minimum, the hospital practice at issue warrants more careful analysis than the *per se* rule permits. While it would thus be appropriate to remand this case for further consideration under a proper legal standard, we thing the record already demonstrates that East Jefferson Hospital's arrangement with

Roux should be encouraged under the antitrust laws, not condemned by them. Far from restraining competition in the provision of anesthesiology services, the arrangement, as we will now show, operates to "increase economic efficiency," thereby rendering the "market more rather than less" competitive. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

II. Petitioner's Contractual Arrangement With the Roux Group Either Should Not Be Classified as a Tie-in or, If So Classified, Should be Upheld Because of its Manifestly Procompetitive Effects

In striking down the closed staff arrangement, the Court of Appeals reasoned that petitioner's contract with the Roux group constituted an unlawful tie-in because of the theoretical separability of the tying product (emergency room time) and the tied product (anesthesiology services). Observing that patients undergoing surgery are "compelled to purchase the hospital's chosen anesthesia service," the Court concluded that "we are dealing with two distinct services which a buyer should be able to obtain separately." 686 F.2d at 289. This analysis reflects a fundamental misunderstanding of the economic realities that support exclusive contracts or other closed staff arrangements in a hospital setting.

Believing that its inquiry was restricted by the *per se* standard, the Court of Appeals ignored the procompetitive effects of petitioner's exclusive contract with Roux & Associates. The Court was thus able to find a tie-in by concluding that the practice involved two discrete products rather than the single product of hospital-based medical services.[3] In our view, this approach is fundamentally

[3] The Court also found that the arrangement had an anticompetitive effect since it restricted competition in the market for anesthesiology services. See 686 F.2d at 292. While we think that this analysis was essentially misguided, see p. 17 *infra*, the basic fact is, of course, that any form of vertical integration necessarily causes some degree of market foreclosure.

flawed. While it is true that "the traditionally stringent *per se* rule of liability [has been] applied in [tie-in] cases[,]" 686 F.2d at 292-93, many courts have nevertheless scrutinized the full range of competitive effects caused by the challenged practice. Such an approach, even if it employs the *per se* rubric, is functionally equivalent to the application of a "Rule of Reason" standard.

A meaningful antitrust analysis of closed system medical departments or other complicated economic arrangements obviously requires more than a hollow counting of products. In the area of alleged tie-ins, as elsewhere in antitrust litigation, "easy labels do not always supply ready answers." *Broadcast Music, Inc.* v. *Columbia Broadcasting Co., supra*, 441 U.S. at 7. To the contrary, this Court's cases make clear that the mere separability of two products or services is not sufficient to classify their combined sale as a tie-in. Careful consideration of the economic consequences of the challenged practice is also required.

In *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), for example, the Court determined that the sale of classified advertising in two separate newspapers constituted only a single product for antitrust purposes. Looking beyond mere separability, the *Times-Picayune* decision examined the nature and function of the allegedly tied products and the economic consequences of the challenged arrangement. 345 U.S. at 613. Although the two products were distinct in a purely formal sense, the Court concluded that their joint sale did not implicate the core concerns of the tie-in doctrine—"the forced purchase of a second distinct commodity . . . resulting in economic harm to competition in the 'tied' market." *Id.* at 614.

In *Automatic Radio Manufacturing Co. v. Hazeltine Research Inc.*, 339 U.S. 827 (1950), a case involving a claim of alleged patent misuse, the Court again declined to characterize as a tie-in an arrangement in which the-

oretically separable goods were sold as a single package. The plaintiff in *Automatic Radio Manufacturing* challenged a patent licensing agreement under which it was required to pay royalties for the use of all of defendants' patents, irrespective of the number of patents actually used. There, as here, there was little doubt that the patent owner *could* have licensed each of its patents separately. However, the Court found that the arrangement "create[d] no restraint of competition beyond the legitimate grant of the patent," 339 U.S. at 833, and promoted efficiency by providing "a convenient mode of operation designed . . . to avoid the necessity of determining whether each . . . product embodies any of the numerous Hazeltine patents." *Ibid.*

More recently in *Fortner II*, *supra*, the Court rejected the claim that United States Steel had unlawfully tied the sale of prefabricated housing (the tied product) to the provision of real estate financing (the tying product). Although bound by its earlier characterization of this arrangement as a tie-in in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 394 U.S. 495 (1969) ("Fortner I"), the Court nevertheless ruled that such an aggregation of products could not be regarded as illegal if the arrangement is supported by legitimate economic considerations and the "package price," if not the price of each item separately, is competitive.[4]

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[4] In sharp contrast to the rigid approach of the Fifth Circuit, other Courts of Appeals have looked to the economic substance of an arrangement to determine whether it amounts to an unlawful tie-in. *See, e.g., Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982); *Hirsh v. Martindale-Hubbell Inc.*, 674 F.2d 1343 (9th Cir.), *cert. denied*, No. 82-570 (Nov. 1, 1982). Rather than focusing on the separability of the aggregated items, these courts have stressed the "function of the aggregation" itself, *Principe v. McDonald's Corp.*, *supra*, 631 F.2d at 308, and the "relationship" between the alleged tying product and the alleged tied product, *Krehl v. Baskin-Robbins Ice Cream Co.*, *supra*, 664 F.2d at 1353. As stated by the Ninth Circuit in

As these cases demonstrate, whether an economic arrangement may be condemned as an unlawful tie-in is a matter of economics, not semantics. Thus, rather than devote our efforts to a hair-splitting inquiry into the number of products involved in a closed staff arrangement, we will focus instead on the economic substance of that practice. Viewed in those terms, a closed staff arrangement should clearly survive antitrust scrutiny.

To begin with, petitioner's contractual arrangement should not be regarded as unlawful because its purpose and effect is to achieve efficiencies in the delivery of health care to "consumers"--the patients of the East Jefferson Hospital. Both the district court and the Court of Appeals found that petitioner's closed department system had *reduced*—not increased—the costs of providing anesthesiology services. (Pet. App. 32a; 686 F.2d 291). Contrary to the Fifth Circuit's view, the fact that these cost savings also resulted in higher profits for the hospital is of no relevance to the legality of the arrangement.[5] It is the potential for increased profits, of course, that motivates all firms, including hospitals, to introduce innovations that either reduce cost or enhance quality.

Hirsh v. Martindale-Hubbell, Inc., supra, the test is "whether the aggregation serves to facilitate competition by promoting product quality or whether it, in fact, amounts to no more than a naked effort to impede competition on the merits." 674 F.2d at 1347.

[5] Similarly, petitioner's higher profits from the anesthesiology department do not necessarily suggest that East Jefferson Hospital possessed market power. See pp. 18-22, *infra*. Although in a perfectly competitive market cost-savings generated through efficiencies in production are ordinarily passed on to consumers, the efficiencies in petitioner's anesthesiology department may have been—and, in all likelihood, were—offset by inefficiencies (and lower profits) in other departments. Since the relevant product here is hospital-based medical services in the aggregate, an inference of market power would only be reasonable if petitioner's overall profits—for all departments and services—were at supracompetitive levels for an extended period of time. The record in the case does not support such a finding.

In assessing the economic substance of the challenged arrangement, one must begin by asking *why* petitioner would want to enter into an exclusive contract for the provision of anesthesiology services. As a general hospital providing surgical facilities and services, petitioner had to assure the availability of anesthesiology services, and could have done so in several ways. East Jefferson Hospital could simply have "opened" its staff to all competent anesthesiologists desiring to practice at the hospital. Alternatively, it could have hired a full-time staff of anesthesiologists who would work directly for the hospital as employees. And finally, it could enter into an exclusive contract with an outside group of anesthesiologists, such as Roux & Associates. Amicus submits that petitioner's choice of the last option can only be explained on the basis that it believed a closed system anesthesiology department would produce the optimal combination of quality and cost. Absent extraordinary circumstances clearly not present here,[6] there simply can be no other answer.

The efficiencies made possible by petitioner's contractual arrangement with Roux relate essentially to the ration-

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[6] One can imagine a situation in which a hospital's management is dominated or controlled by the medical specialists whose closed department is subject to challenge. In such circumstances it is possible that an exclusive contract or other closed system arrangement could be used to facilitate horizontal collusion among the specialists in control, at the expense of the hospital's separate interest in minimizing costs or enhancing quality. In view of the historical role played by medical staffs in protecting quality care, we believe that such collusion may never be presumed merely on the basis of the identity of the hospital's managers and owners, or other aspects of the hospital's organization. To be given any weight, such collusion must be affirmatively proven by direct evidence. In the instant case, of course, the medical staff at East Jefferson Hospital recommended in favor of respondent's admission to the hospital staff. Moreover, there was no evidence that the closed department arrangement resulted in increased prices for anesthesiology services—the inevitable consequence of collusion among medical specialists.

alized use of the hospital's limited resources. As found by the district court, petitioner's contract with the Roux group (1) ensures anesthesiology coverage on a twenty-four hour basis; (2) facilitates the standardization of anesthesiology procedures and services; (3) permits greater flexibility in the scheduling of operations by eliminating the need to accommodate physicians' outside commitments; (4) enables the medical team of physicians and skilled nurse anesthetists to develop a work routine and to maximize proficiency; (5) reduces the cost of equipment maintenance by limiting access to a small group of doctors; and (6) enhances the hospital's ability to monitor the quality of patient care. (Pet. App. 32a-33a.)

These are not merely hypothetical or speculative benefits, but real and substantial efficiencies that are likely to obtain in *any* closed department system for the delivery of medical services. *See* D. Horan & R. Nord, *Application of Antitrust Law to the Health Care Delivery System*, *supra*, at 702. Indeed, a closed staff may be virtually essential for certain kinds of patients. In the mental health area, for example, some patients need long-term and intensive treatment that often requires that the psychiatrist be available to plan and monitor the full range of the patient's daily activities. A relatively small, stable medical staff, moreover, enhances the sense of community and security that is important to patients—particularly children and adolescents—who require long-term psychiatric treatment. In addition, the use of a closed staff allows physicians to become familiar with the psychiatric problems of many patients, thereby facilitating collaborative efforts in making difficult treatment decisions. In view of these considerations, an antitrust prohibition against closed staffs could effectively deny certain patients an important type of treatment altogether.

Even if it could be suggested that some of these benefits might be achieved in other "less restrictive" ways, 680

F.2d at 292, the suggestion is immaterial for antitrust purposes. One can always imagine some theoretically less restrictive arrangement that, in a purely hypothetical world, would yield comparable benefits. *Cf. Illinois Election Board v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring) ("A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation"). In the real world, of course, it is likely that the imagined alternative would either exact a higher cost, yield fewer benefits, or both.[7]

The use of a closed staff arrangement in a hospital setting thus makes possible important efficiencies that should not be disregarded in an antitrust analysis. On the other hand, it is difficult to see what anticompetitive effects are likely to result from such an arrangement. To be sure, it might be argued that a closed staff limits competition among physicians for patients—a proposition advanced by the Fifth Circuit in this case. 686 F.2d at 292. While this is doubtless a form of economic "restraint," its anticompetitive impact is at most very limited, and more likely nonexistent. The fact is that in many cases patients do not "choose" a physician in the same sense that a consumer traditionally makes purchasing choices. Instead, they are generally referred by other doctors or rely on the hospitals to provide a competent staff. In these circumstances, a hospital, by effectively acting as a joint purchasing agent for its patients, can stimulate competition among physicians through the use of a closed staff or an exclusive contract. To participate in such a program, of course, physicians must compete on the basis of price or quality—competition that ultimately inures to the benefit of patients.

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[7] The problem is that this proposition can never be conclusively established in a judicial setting. The result is that application of the "least restrictive alternative" test in antitrust cases leads ineluctably to invalidation of the challenged arrangement.

In addition, if a patient does in fact want to select his own physician who is not a member of the closed staff, he is always free to go to another hospital where that physician has privileges. See pp. 20-21, *infra*. Obviously, a hospital that employs a closed staff takes that competitive risk in return for the benefits it secures. The net effect is to encourage competition since the consumer is given a choice between the efficiencies of a closed staff hospital and the opportunity to select his own physician at an open staff hospital.

For these reasons, we believe that it would disserve the purposes of the antitrust laws to treat closed staffs or exclusive contracts for physician services as unlawful restraints of trade. In common sense terms, a hospital is much more than a hotel. A patient obviously purchases a package of medical services which, depending on the nature of the patient's illness, may include both surgery and anesthesiology services. Although there may be valid reasons for unbundling this package in certain circumstances—by allowing a patient to select his own physician, for example—there are equally good reasons for keeping the package intact. As long as a hospital makes an independent business judgment to use a closed staff, there is no reason to suspect that the effects of such a decision will be anticompetitive.

III. The Court of Appeals Erred in Determining that East Jefferson Hospital Possessed Market Power

Even assuming that the exclusive contract with Roux Associates may be labelled a tie-in, it may not be invalidated unless it can also be shown that East Jefferson Hospital possessed sufficient market power in the tying product—here, hospital beds. See, *e.g.*, *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958). On this ground alone, the decision below should be reversed. By finding East Jefferson to be a virtual monopolist for the provision of hospital services, the Court of Appeals

took an artificially cramped view of competition among health care providers.

As discussed earlier, the Fifth Circuit rejected the district court's finding that East Jefferson Hospital competed with other hospitals in the New Orleans metropolitan area. Although the Court of Appeals did not set aside the district court's findings, it nonetheless held that traditional principles of market definition do not apply to the health care industry. Relying on generic factors that it labelled as "market imperfections," the Court concluded that the relevant geographic market consisted only of the East Bank of Jefferson Parish. 686 F.2d at 291. In effect, the Court below held that petitioner constituted a relevant market unto itself.

The Court of Appeals' analysis is misconceived for at least two reasons. First, the Court failed to apply the functional market analysis required by this Court's tie-in cases. The seller of allegedly tied products may not be subject to a rule of *per se* illegality unless the "tying" product is determined to be so unique or distinctive as to confer on the seller a substantial advantage not shared by his competitors. See e.g., *International Salt Co. v. United States, supra; United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pacific Railway Co. v. United States, supra.* As the Court stated in *Fortner II, supra*, 429 U.S. at 620, the question is "whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market."

These indicia of market power are wholly lacking in this case. There was no suggestion that petitioner's operating rooms were in any sense distinctive, much less "unique" enough in terms of quality and price to impart to petitioner a major competitive advantage. Nor was

there any evidence, direct or indirect, that East Jefferson Hospital was able to influence the price of operating room time or to impose "burdensome" conditions on patients or doctors with respect to the sale of that time. On the contrary, the district court expressly found that East Jefferson Hospital, as one of 20 hospitals in a nearby portion of the New Orleans area, was without the power to engage in anticompetitive practices of this type. (Pet. App. 34a).

Second, and more important, the Court of Appeals' rigidly narrow market definition—effectively excluding from the relevant market all hospitals other than petitioner—cannot be sustained. The various factors on which the Court relied, while not irrelevant to an assessment of the functioning of the market for hospital-based services, do not justify the extraordinary conclusion that the economically relevant market in this case embraced only East Jefferson Hospital. As discussed earlier, it follows inescapably from that conclusion that every hospital in the country is a monopolist, or at least enjoys sufficient market power to trigger *per se* analysis under the tie-in doctrine.

The Court relied heavily on a perceived consumer preference for neighborhood hospitals. Pointing out that most of petitioner's patients reside in East Jefferson Parish, the Court found that "patients tend to choose hospitals by location rather than price or quality." 686 F.2d at 290. Although some consumers may favor hospitals located close to home, that mild preference hardly translates into market power. By that logic every regional brand of beer is a monopolist, notwithstanding intense competition from national brands; and every neighborhood grocery is a monopolist, even though it may be located a block away from a major supermarket. Obviously, the relevant question is not whether most of East Jefferson Hospital's patients are drawn from the local community, but whether most of the patients in the local

community use East Jefferson Hospital. On this point the record is unambiguous: the district court found as fact that more than 70 percent of all East Jefferson Parish residents use hospitals *other than petitioner*. (Pet. App. 33a). There can be no question but that petitioner competes with these other hospitals.

The Court of Appeals also relied on the judicially noticed "facts" that consumers are indifferent to the costs of medical care because of the pervasiveness of third-party insurance and a lack of information concerning the quality of medical services. Whatever the merit of these asserted "market imperfections," it is clear that they too are insufficient to support the conclusion that petitioner, by itself, constitutes a relevant geographic market. Other courts presented with similar arguments have declined to slice the market so small. See e.g., *Dos Santos v. Columbus Medical Center*, *supra*, 684 F.2d at 1353; *Robinson v. Magovern*, 521 F. Supp. 842, 878, *aff'd mem.*, 688 F.2d 824 (3d Cir.), *cert. denied*, No. 82-415 (Nov. 1, 1982). Although competition plays a different and more complicated role here than in other industries, it is simply not the case that hospitals and other providers of medical services can raise prices and reduce quality with impunity, free from fear that such actions will result in a loss of market share. On the contrary, hospitals compete intensively on the basis of the quality of medical care. See C. Havighurst, *Regulation of Health Facilities and Services by 'Certificate of Need,'* 59 Va. L. Rev. 1143, 1162-63 (1973). And in certain areas of the industry—for example, competition between health maintenance organizations and more traditional providers—competition on the basis of price is highly significant. See Note, *The Role of Prepaid Group Practice in Relieving the Medical Care Crisis*, 84 Harv. L. Rev. 887 (1971).

In sum, there is no basis for the Fifth Circuit's conclusion that petitioner possesses market power. In the absence of evidence that East Jefferson Hospital has been

able to influence prices or take other anticompetitive action, economic power simply cannot be presumed on the basis of theoretical "market imperfections" or other generic factors. On its face, the Court's finding that petitioner was immune from competitive pressures makes no sense. The more reasonable conclusion, we submit, is that petitioner entered into the challenged arrangement not because of indifference to competitive pressures, but precisely to *respond* to competitive pressures to hold down the costs, and to enhance the quality, of medical services.

CONCLUSION

For the foregoing reasons, amicus submits that the decision of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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